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Supreme Court of the United States

OCTOBER TERM, 1960

KARL L. PEDERSEN,

Libelant,

against

TANKER BULKLUBE, her engines, etc.,

Respondent,

TODD SHIPYARDS CORP.,

Respondent-Impleaded.

BRIEF OF RESPONDENT-IMPLEADED, IN OPPOSITION TO LIBELANT'S PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States District Court for the Southern District of New York is officially reported in 170 F. Supp. 462. The opinion of the Court of Appeals for the Second Circuit, affirming the District Court, is reported at 274 F. 2d 824.

Statement

The libelant, a rigger employed by Todd Shipyards, was injured on August 8, 1952, aboard the S.S. Bulklube, when a staging on which he was standing collapsed and precipitated him into a tank.

The vessel was then in Todd Shipyards undergoing extensive repairs, amounting to a virtual rebuilding of its

interior, pursuant to a contract between its owner and the Todd Shipyards Corporation. It was under the exclusive control of Todd and all of the work was being done by Todd's employees under the supervision and direction of Todd's supervisory personnel.

The ship was not in navigation. It had no crew aboard. The only contact its owner had with it during the time repairs were being made was through two inspectors whose function it was to see that the repairs when completed conformed to the contract specifications.

In a prior action by another rigger who was injured aboard the same vessel during the course of the repairs under the same contract, it was held that the injured workman could not recover for a breach of the warranty of seaworthiness because the vessel, in its then status, owed a warranty of seaworthiness to no one; and it was further held that the owner was not liable in negligence because it was not in control of the vessel. (*Berge* v. *National Bulk Carriers*, 148 F. Supp. 608, affirmed 251 F. 2d 717, certiorari denied, 356 U. S. 958.) The subsequent decision by this court in *West* v. *United States*, 361 U. S. 118, confirmed the correctness of that holding.

To avoid the impact of those decisions, the libelant sued *in rem*, claiming a lien on the vessel for the injuries which he suffered aboard her. His contention has been rejected by the District Court and by the Court of Appeals for the Second Circuit.

The Question Presented

1. Whether a maritime lien arises under general admiralty law in favor of a shore-based worker, who is injured on board a vessel which is not in active navigation, where the status of the vessel is such that her seaworthiness is not warranted by her owner and where the owner, being out of control, is not liable to the injured workman in negligence.

ARGUMENT

The S.S. Bulklube was not in maritime service. She was in the Todd's drydock undergoing extensive repairs for the purpose of making her seaworthy. In that status, she owned a warranty of seaworthiness to no one. Further, the libelant's injuries were not caused by her as a moving agent. No maritime lien or privilege, therefore, accrued in favor of the libelant as a result of his injury on board her.

A suit *in rem* in admiralty is a proceeding to give effect to a maritime lien and the existence of the lien must be established if the proceeding is to be sustained. (*The Resolute*, 168 U. S. 437, 42 L. ed. 533, 18 Sup. Ct. Rep. 112.) Such direct action against the vessel itself, for damages resulting from its torts is founded on the fiction that the vessel is an independent juristic person, capable of inflicting injury through its own unseaworthiness or through the actions of its agents or personnel. The ship itself is regarded as the offender and "is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession of her, whether as owner or charterer." (*The Barnstable*, 181 U. S. 464, 467.)

The lien attaches only in cases where the ship is the offender, "the noxious instrumentality", not a mere passive instrument of the harm. (*The Eugene F. Moran*, 212 U. S. 466, 474.) In that case, the opinion points out:

> "No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible, on principles of agency or otherwise, is carried further here than in England. • • • Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts that he has done his best to prevent has been

> helped by the feeling that it was desirable to have someone who is able to pay. * * * But, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached."

The distinction was noted by Mr. Justice Holmes in his decision in *The Blackheath*, 195 U. S. 361, 366:

> "What the early law seems most to have looked to as fixing the liability of the ship was the motion of the vessel, which was treated as giving it the character of a responsible cause. * * * The responsibility of the moving cause took the form of deodand when it occasioned death, like the steam engine in *Queen* v. *Eastern Counties R. Co.*, 10 Mees. & W. 59, and innumerable early instances, but it was not confined to such cases. * * * The principal has remained until the present day. *United States* v. *The Malek Adhel*, 2 How. 210, 234, 11 L. ed. 239, 249; *The China*, 7 Wall. 53, 19 L. ed. 67."

Though there may be differences of opinion in the decided cases as to other aspects of maritime liens, there seems to be unanimous agreement that, apart from liens created by statute, maritime liens are imposed upon the vessel in cases of tort only when the vessel itself is the offending instrumentality, either through its unseaworthiness, which here is irrelevant, or through its motion or mismanagement by its personnel. Every consideration which led to the recognition of liens and their permanent establishment in the general admiralty law supports that conclusion. There is a sound basis in reason from impos-

ing a lien on a vessel where a contract made for its benefit has been breached or where damage has been caused through its instrumentality. But there is no reasonable basis for imposing liability on the vessel for damages which she did not cause and with which her only connection happens to be that they occurred on board her. (*Latus* v. *United States of America and Todd Shipyards Corp.*, 2d Cir., decided April 11, 1960, not yet officially reported.) In writing the opinion of the court in the *Latus* case, Judge Learned Hand said:

"The libelant's final position that, even if the United States was under no personal duty to use such reasonable care, in any event a liability *in rem* arose independently. There are, of course, such duties known to the maritime law, the best known of which is the liability of a ship for the negligence of a compulsory pilot, *The China*, 7 Wallace 53. It is also true that when a ship is on a 'bare-boat' charter, negligence of the crew 'appointed and paid by the charterers' will charge the ship *in rem*. *The Barnstable*, 181 U. S. 464. In the case at bar, Todd Shipyards was not such a charterer, or indeed a charterer at all. Like the owner's warranty of seaworthiness, an implied liability *in rem*, regardless of any personal duty of the owner, is a fiction, reaching far back into the early history of the law; and has been often quoted, 'a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong.' *The Eugene F. Moran*, 212 U. S. 466, 474. We can find no decision in which such a lien has been imposed on the ship for the fault of another person than the owner, when that fault is not that of a 'bare-boat' charterer, or of some specified class of person like a compulsory pilot. * * * *Grillea* v. *United States*, 232 F. 2d 919 (C. A. 2), merely held that a longshoreman might sue a ship *in rem*, if he was injured by her unseaworthiness, which no one denies."

It might be pointed out that the decision in *The China*, *supra*, on which the libelant so insistently relies, follows logically from the concept that the ship is an independent juristic person. The pilot in that case, though not an employee or agent of the owner of the vessel, was the agent of the vessel itself and his negligence in navigation rendered the vessel liable, independently of any liability on the part of its owner. And the *Grillea* decision, as Judge Hand points out, was based on the finding that the workman's injury resulted from the unseaworthiness of the vessel, and that he thus had a right *in rem* against the vessel, irrespective of whether the owner was personally responsible or not. (*The Osceola*, 189 U. S. 158, 171, 175; *Packing Co.* v. *Sandanger*, 259 U. S. 255, 259.)

Attempts to use the fiction of the maritime lien to obtain recovery outside of the presently established limits have not received judicial approval. It was said in *Samuels* v. *Munson S.S. Line*, 63 F. 2d 861, 862: "Collection of damages out of the ship is but indirect method of collecting damages from the owner or owners; for in case of unseaworthiness the owners would be personally liable for the full amount of the damages and in other cases they would be liable to the extent of their interest in the ship." And in *Smith* v. *The Mormacdale*, 198 F. 2d 849 (certiorari denied, 345 U. S. 908), it was said, at page 850: "We can draw upon the entire anthology of legal fiction in admiralty and nowhere find the vessel personified to the extent that it has been considered emancipated from its owner."

Cases cited by the libelant here, which deal with liens granted by statute to repairmen have no relevance. The libelant does not have, and does not claim, a statutory lien. What he claims is that he has a lien under the general maritime law. All relevant judicial decisions seem to be unanimous in holding that no such lien exists in the circumstances disclosed in this record. Further review by this Court, therefore, would not seem to be indicated.

CONCLUSION

The principles of law underlying the decision of the District Court and of the Court of Appeals are well established and uniformly recognized in all circuits. The Petition for the Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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